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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB SKORNIAK,

Defendant and Appellant.

D073299

(Super. Ct. No. SCD265034)

ORDER MODIFYING OPINION

THE COURT:

On the court's own motion, it is ordered that the opinion filed August 13, 2019, be modified as follows to correct a typographical error:

On page 45, in the Disposition, "765 days" is deleted and replaced with "795 days."

**There is no change in the judgment.**

HALLER, Acting P. J.

Copies to: All parties

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(Super. Ct. No. SCD265034)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed as modified.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

After celebrating with friends on New Year's Eve, a German exchange student, Tanja B., headed home alone around midnight while her friends continued celebrating. Before she reached home, defendant Jacob Skorniak admittedly drove her to a secluded location, cut her clothes off with a knife, had sexual intercourse with her, videotaped portions of the encounter, dropped her off near her home, then left town at 3:00 a.m. He was arrested in Santa Barbara about three weeks later. At trial, Skorniak maintained Tanja consented.

Tanja did not return from Germany to testify at trial. Instead, several witnesses testified about their interactions with her the night of the incident. For example, her father testified she accidentally called home from her cellphone during the incident and he overheard Tanja begging the perpetrator, "Take everything but please don't do anything to me." A witness Tanja encountered at a gas station when Skorniak was taking her home testified that Tanja said she was being kidnapped. One of the friends Tanja had been celebrating with testified that, upon being reunited, Tanja immediately disclosed she had been raped at knifepoint. Finally, one of the police officers who responded to the friend's 911 call testified about the substance of his interview of Tanja shortly after her release.

A jury convicted Skorniak of forcible rape (Pen. Code, § 261, subd. (a)(2)),<sup>1</sup> with kidnapping and weapon-use special circumstance allegations (§ 667.61, subds. (d)-(e)); kidnapping for rape (§ 209, subd. (b)(1)), with a weapon-use enhancement allegation

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

(§ 12022, subd. (b)); and sexual penetration of an unconscious victim (§ 289, subd. (d)). After Skorniak admitted certain priors, the trial court sentenced him to 81 years to life and imposed certain fines and fees.

Skorniak raises several evidentiary issues on appeal. First, because Tanja never returned to testify, he maintains the admission of her statement to the responding officer shortly after the incident violated his rights under the confrontation clause, as enunciated in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).<sup>2</sup> We conclude Skorniak forfeited this challenge, and the forfeiture was not the result of ineffective assistance of counsel. Second, Skorniak contends the court erred by admitting other testimony that he maintains improperly vouched for Tanja's credibility, attacked his character, and opined on the ultimate question of his guilt. For reasons we will explain, we conclude none of these challenges has merit.

Skorniak also raises several sentencing issues. First, he contends the abstract of judgment reflects the incorrect sentence for his kidnapping conviction. We disagree. Second, he contends the trial court erroneously awarded victim restitution to the San Diego Police Department (SDPD) for the cost of Tanja's sexual assault exam. We agree, and strike this restitution award. Third, he contends the trial court failed to consider his ability to pay the fines and fees it imposed. We conclude he forfeited this challenge by failing to raise it during sentencing. Fourth, he requests that we correct a one-day error in the trial court's calculation of his presentence custody credits. We will do so. Finally, he

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<sup>2</sup> Skorniak does not assert a *Crawford* challenge to the other witnesses' testimony.

requests that we remand to give the trial court the opportunity to exercise newly vested discretion to strike the previously mandatory five-year enhancement imposed for Skorniak's serious felony prior conviction. We conclude that doing so would be futile on this record.

In all other respects, we affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Prosecution Case*

In August 2015, Tanja, a 21-year-old German college student, traveled to San Diego to spend a semester as a foreign exchange student. She lived in an apartment on Sapphire Street in Pacific Beach. She was scheduled to return to Germany in mid-January 2016.

Tanja spent New Year's Eve of 2015 with three other young German women—her friend, Anna, who was visiting from Germany; a fellow exchange student, also named Anna; and the latter Anna's sister, Mona.<sup>3</sup> Around 3:00 p.m., Tanja and Anna shared a "tiny bottle" of sparkling wine at the beach to toast the new year in Germany, which is nine hours ahead of San Diego time. Tanja called or texted her parents in Germany to wish them a happy new year.

Tanja and Anna got dressed for the evening at Tanja's apartment, where Mona and her sister picked them up and drove them to a steakhouse where they had dinner and

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<sup>3</sup> Both Annas also have the same last initial. When we refer in this opinion to "Anna," we will be referring to Tanja's visiting friend, who testified at trial, unless we expressly state we are referring to the exchange student, who did not testify at trial.

shared one bottle of wine. After dinner, they went to exchange-student Anna's apartment, where they played cards and drank a few gin drinks; Tanja and Mona also had one shot of tequila. The four women then took an "Uber" rideshare to a bar in Mission Beach.

They stayed for only about a half-hour because Tanja said she had drunk too much, wasn't feeling well, and wanted to go home. The women agreed they would share an Uber back to Pacific Beach, where Tanja could go home and the others would go to another bar.

Using Tanja's phone, the women summoned an Uber ride, inputting Tanja's apartment as the destination. The Uber receipt shows they were picked up from the Mission Beach bar at 11:44 p.m.<sup>4</sup> Tanja sat in the front passenger seat of the Uber driver's Prius, and the other three women sat in the back seat. After an eight- or nine-minute drive, the Uber driver dropped off the backseat passengers at a bar in Pacific Beach. They told the driver that Tanja "wasn't feeling good and to take her home the rest of the way" to Sapphire Street. The driver agreed Tanja "seemed kind of . . . nauseous" or "sick."

The Uber driver testified he estimated it would take another six or seven minutes to reach Tanja's apartment. A few blocks before the destination, Tanja covered her mouth with her overcoat or sweater and vomited a little. Tanja wanted out, so the driver pulled over. Tanja got out right away, and the driver said, "We need to keep going. It's a

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<sup>4</sup> The driver testified he thought he picked up the women at about 12:20 a.m., but he acknowledged the timestamps on Uber receipts are "usually pretty accurate."

little further." Tanja responded that she wanted to walk. The driver pointed in the direction of Sapphire Street and said, "You need to go this way." After watching Tanja take a few steps in the right direction, the driver drove down the road a little, turned the "meter" off, and stopped to clean the passenger seatbelt and door handle. The Uber receipt shows he turned the meter off at 11:56 p.m.

Around 12:30 or 1:00 a.m. (San Diego time), Tanja's mother (Mother) in Germany answered a phone call from Tanja's cellphone number.<sup>5</sup> Nobody was speaking into the other end of the phone, but Mother heard noises she "could no longer bear to listen" to. She "was really disturbed," began crying, and gave the phone to Father.

Father surmised from the sound of the call that Tanja had accidentally called them. He heard Tanja say, "Take everything but please don't do anything to me." Tanja sounded "terrified." Father "then . . . heard . . . sexual activity beg[i]n," with "a smacking sound and then . . . muffled sounds." Father heard Tanja "crying and whimpering." Father testified the encounter "was definitely not with consent." He screamed into the phone in English, "Stop. Stop it." After about 15 minutes, the call disconnected. Father tried calling Tanja back repeatedly, but the calls went straight to voicemail.

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<sup>5</sup> Tanja's father (Father) traveled from Germany to testify at trial about the circumstances of this call.

Father tried to call the police in San Diego, but could not find a number. He then called local German police, who connected him with SDPD. Father reported what he had heard in the phone call.<sup>6</sup>

As Father was trying to contact the police, Mother and their younger daughter (Sister) called Anna. Sister conveyed that they had received a call from Tanja in which they could hear her crying and being sexually assaulted. Anna tried calling Tanja, but the call went to voicemail. Anna led the other two women outside the bar and called 911 at 1:20 a.m.<sup>7</sup>

Anna told the 911 operator about sending Tanja home in an Uber and later receiving a call from Sister stating Tanja had been sexually assaulted. Anna told the operator they would meet the police at Tanja's apartment. Tanja's friends arrived at her apartment before the police. They did not have a key, so they looked around outside, but did not find Tanja.

SDPD Officer Geoffrey Kaiser was dispatched to Tanja's apartment for "a check the welfare call" at 1:53 a.m. When Kaiser arrived about 10 minutes later, another officer (Officer Durbin) who had arrived a few minutes earlier was talking to Tanja's friends on the sidewalk in front of her apartment. The two officers spent the next approximately 90

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<sup>6</sup> A recording of Father's call to the police was played for the jury. The transcript of the call indicates it began at 1:15 a.m.

<sup>7</sup> A recording of Anna's 911 call was played for the jury.



minutes coordinating with their dispatcher to check local hospitals and jails in case Tanja had been injured or arrested for being drunk in public.

Meanwhile, a little after 3:00 a.m., roommates Michael K. and Gregory B. stopped for gas at a station on Clairemont Mesa Boulevard near Interstate 805. Michael had just finished his shift as a security manager at a bar and was wearing a shirt with "security" emblazoned in big block letters on the back. When Michael returned to his car from paying inside the mini-mart, he noticed that a truck had parked on the opposite side of the pump island.

Michael testified that as he walked by, a young woman in the passenger side of the truck whispered "hey" and "started motioning . . . like, come here." The woman in the truck told Michael softly in a Swedish or German accent that her name was "Tanja" or "Tania" and that "she was being kidnapped." Michael saw that she "was very, very scared," she looked like she had been crying, her makeup was running, and her hair was "pretty disheveled." Michael told the woman to get out of the truck, but "she kind of recoiled and sat back like she didn't want to get out."

Michael walked back to his car and told Gregory, "I don't know what the F is going on over here, but this girl just told me she's being held against her will. Call 911." Gregory testified that the woman in the truck "definitely looked . . . scared. I mean, something was up. Something was wrong with the situation." Gregory called 911 at 3:17 a.m.<sup>8</sup>

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<sup>8</sup> A recording of Gregory's 911 call was played for the jury.

An older man approached the truck from the mini-mart and started pumping gas. When he finished, he got in the truck, yelled at the woman, and they drove off. Gregory recounted this to the 911 operator and described the man and his truck. Michael and Gregory later identified Skorniak in a photo lineup and at trial as the man from the gas station. Gregory described the truck as red and silver with a green Colorado license plate and "a bunch of stuff tied down in the back." He gave the dispatcher the license plate number.

Back at Tanja's apartment, Officers Kaiser and Durbin overheard their dispatcher announce that another police division was working a kidnapping case involving a female named Tanja and a red and silver truck with a Colorado license plate. Shortly after 3:30 a.m., as they were still talking to Tanja's friends, the officers saw a truck fitting that description drive by them on Sapphire Street. The officers jumped in their patrol cars to pursue the truck, but soon lost sight of it. At 3:36 a.m., about two minutes after the truck had first passed him, Kaiser radioed that he could not find it. He and other responding officers kept searching for another 10 or 15 minutes.

Meanwhile, about two or three minutes after Kaiser and Durbin had left to pursue the truck, Anna saw Tanja walking along the street. Tanja's stockings were torn, she had wrapped her jacket around her, and she smelled like vomit. Anna later saw that Tanja's dress was "ripped apart." Anna described Tanja's demeanor as "screaming" and "tremoring . . . like a light weeping."

Anna testified at trial about what Tanja told her had happened. "[T]he first thing that [Tanja] could remember was that she had a knife against her throat." She said "she

had been driving along the highway and that the car stopped and then the man . . . came on top of her" and "raped her," but she did not think he ejaculated. Tanja said "[i]t was absolutely not with her consent" and the man "always had [a] knife in front of her."

Tanja said "she did not defend herself because she was hoping that then it would be over faster," and, in any event, "he was sitting on top of her, and she didn't see any opportunity to free herself."

Tanja told Anna about telling a man at a gas station "that she had been kidnapped." Tanja seemed upset "because she thought that the man had not helped her."

Tanja told her friends she did not want them to call the police or her parents because the perpetrator "apologized for what he had done to her and [said] that he would kill himself." The friends told Tanja "that her parents already knew about it and that the police had already been informed."

Anna testified the four women got into one of their cars and drove around to find a police car because they "didn't know what was going on and there weren't any police there, and [they] were afraid that maybe the perpetrator would come back." After a minute or two, they saw a police car and pulled in front of it to get help.

At 3:59 a.m., Kaiser's sergeant (Sergeant Layton) radioed that he was standing on Loring Street (about one block from Tanja's apartment) with four females reporting a rape. Kaiser started to "put two and two together that these were the same three girls that [he] had been speaking with [on] Sapphire [Street]." Two minutes later, Layton radioed that their "suspect was armed with a seven-inch hunting knife."

Kaiser responded to Layton's call and confirmed that the reporting parties were Tanja's friends. Tanja was there now, too. Kaiser testified she "definitely appeared visibly upset. It looked like she had been crying for some time. [¶] . . . [¶] . . . And she had a black dress and some black leggings on still, but you could tell they had been torn a bit and that she was trying to cover herself up with [a] white shawl. [¶] . . . [¶] [S]he was shaking and just visibly upset. You could tell something traumatic had happened." Kaiser testified, "We decided to go back to their apartment . . . so we could start interviewing them." The women drove themselves there; the police drove separately.

Officer Kaiser interviewed Tanja in one room, while Officer Durbin interviewed each of the other three women separately in another room. At least one friend was always with Tanja during her interview "just to console her." Kaiser "started kind of from the beginning of the evening with her."

Tanja told Kaiser an Uber dropped her friends at another bar, but she stayed in it to go home because she drank too much and was not feeling well. She did not recall getting out of the Uber car or getting into a truck. She remembered telling the driver he was driving the wrong way and seeing that he was holding a large folding knife. She got scared and started crying.

Tanja described the suspect as a white male in his 60's, 5'10" tall, with tattoos on both arms, and he "looked like someone who had just got out of prison." She had never seen him before. Kaiser showed Tanja a picture of the Uber driver from the electronic receipt, and she confirmed he was not the suspect.

Kaiser said Tanja reported that the suspect drove about 10 minutes to "some nondescript place," stopped on the side of the road, and got on top of her, telling her, "You're so hot. You know you want this." Tanja begged him to stop, but "he took the knife and started to cut her dress and leggings off." The suspect then "climbed on top of her" for about two minutes "and raped her." Tanja did not think the suspect wore a condom or ejaculated inside her. Tanja said "she told him to stop and begged him to stop and that it was not consensual." She did not fight back because the suspect had a knife and "she was afraid he was going to cut her throat if she fought back." After the rape, the suspect got back in the driver's seat and "apologized in some manner[,] saying, 'I'm sorry. I've hurt you enough.' "

Tanja told Kaiser the suspect offered to take her home. When he could not enter her address into his GPS device, he became frustrated and slapped her face. They drove to a gas station and, when the suspect went inside to pay, Tanja told a patron wearing a "security" shirt that she needed help. She told Kaiser she stayed in the truck because she was afraid the suspect would kill her if he saw her outside the truck.

After getting gas, the suspect drove to Tanja's apartment, but saw two police cars and kept driving down the street. The suspect asked Tanja if she had called the police, and she said, "No." The suspect "got upset . . . and frustrated at the whole situation and made some type of comment about 'gonna drive the truck off a bridge.' " He eventually pulled over, let Tanja out, and drove off. Tanja headed toward her apartment and found her friends.

Kaiser testified Tanja "was upset" during the interview, and "there were times when she would be talking where she would break down crying." The interview lasted between 10 and 30 minutes. After the interview, Kaiser collected Tanja's dress, leggings, and shawl for DNA testing.

After Kaiser finished interviewing Tanja, another officer took her to a sexual assault nurse examiner for a sexual assault response team (SART) exam. Nurse Joy Brychta examined Tanja at 8:00 a.m. on January 1. Tanja "was visibly upset" and "had tears in her eyes," but she consented to the exam "and was very cooperative."

Brychta observed that Tanja's blood pressure, pulse, and temperature were slightly elevated, consistent with being upset and under stress. During an examination of Tanja's external genital area, Brychta observed three fresh fissures or lacerations caused by "[b]lunt force or the tissues being stretched too far."<sup>9</sup> Brychta testified these injuries are "consistent with an individual being sexual[ly] assaulted," but she acknowledged on cross-examination that they are also consistent with consensual sex. Brychta took internal and external vaginal swabs and obtained a blood sample.<sup>10</sup> The vaginal swabs tested positive for Skorniak's DNA.

Father testified that within a few hours of his initial call to police, he learned that Tanja had been found. He spoke with Tanja's friends, but Tanja "was so disturbed from

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<sup>9</sup> Skorniak incorrectly asserts in his opening brief that the "lacerations were *not* very fresh." (*Italics added.*)

<sup>10</sup> The parties stipulated that analysis of Tanja's blood sample determined her "blood alcohol level was a .09 percent."

the act" that she "could not speak with [her family]." Although Tanja was not scheduled to return to Germany until mid-January, she flew home the next day (January 2) because "[s]he wanted to go home as quickly as possible." When Father picked her up at the airport, "[s]he was still in pieces." Father testified Tanja has never spoken to him about the incident because she "wanted to leave the thing behind her as quickly as possible" and "lead a normal life."

About three weeks after the incident, state park rangers in Santa Barbara County observed a truck illegally parked in a campground. A man, later identified as Skorniak, was sitting at a picnic table nearby. The rangers ran the license plate and learned the vehicle and its occupant were wanted in connection with crimes committed in San Diego. The rangers took Skorniak into custody and recovered two knives from his waistband. They impounded his truck.

Detective Rich Forsey of SDPD's sex crimes unit testified Skorniak and his truck were transported from Santa Barbara to San Diego, where police examined the truck's contents. Police found Tanja's cut underwear, which tested positive for Skorniak's DNA.<sup>11</sup> They also found a digital camera and about 30 memory cards. One of the memory cards contained a video showing Skorniak digitally penetrating Tanja's vagina while she appeared to be unconscious. When police adjusted the time stamp on the video to the correct time, it indicated the video was taken at 12:46 a.m. on January 1, 2016. The video was played for the jury.

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<sup>11</sup> Police also found about six pairs of other women's underwear in Skorniak's truck.

Another memory card contained 88 photos of young women wearing bikinis and playing beach volleyball. Many of the photos appeared to have been taken surreptitiously and focused on the women's buttocks. The photos were taken on December 31, 2015.

A video of the gas station's surveillance footage was played for the jury. Detective Forsey identified Skorniak and his truck in the video.

### *Defense Case*

Skorniak testified he had consensual sex with Tanja. In December 2015, he loaded his "worldly possessions" into his truck and drove from his home in Colorado to tour the California coastline. He ended up in San Diego on New Year's Eve. As he was driving through Pacific Beach around midnight looking for a fireworks display, he saw Tanja crossing the street. He stopped in the middle of the intersection for 15 to 20 seconds to talk to her. When Tanja approached, Skorniak "noticed she was very pretty and offered her a ride home." Skorniak said Tanja did not appear drunk or sick, was not slurring her words, and did not smell like vomit.

Tanja got in the truck and told Skorniak her house was on Sapphire. Skorniak started driving and "kept stalling with the GPS" so he could spend more time "chitchat[ting]" and "flirting." He drove 10 or 15 minutes up the street to a "dark secluded area" hoping to have sex with her. They chatted for 20 or 25 minutes, during which Tanja became "more flirtatious" and moved "closer and closer" to Skorniak.

Skorniak kissed Tanja, and she kissed him back. Things escalated "[v]ery rapidly." Skorniak was having trouble removing Tanja's dress, so he used a seven-inch folding Buck knife to cut it off, along with her bra and underwear. Skorniak dropped his



knife on the floorboard, pulled down his pants, and had consensual sex with Tanja. To "help her along," Skorniak digitally penetrated Tanja's vagina.

Because she "was a very pretty girl," Skorniak videotaped this portion of the encounter. When Tanja realized she was being recorded, she got upset and told Skorniak to stop. Skorniak wanted to keep the recording, so he apologized profusely and gave Tanja a t-shirt, which she put on. After talking for an hour or more, Tanja calmed down and asked to be taken home.

Skorniak started driving and "mess[ing] with the GPS." He got lost a few times and accidentally ended up on a highway. He got frustrated with the GPS and broke the rearview mirror off his windshield. Tanja "was freaked out" by Skorniak's "bad attitude."

Skorniak realized he needed gas, so he pulled off the highway and went to a gas station. He went inside to pay, then came back out and pumped the gas. He never threatened Tanja that he would hurt her if she got out of the truck. Skorniak's GPS started working again, so he followed it toward Tanja's apartment.

When they got to Tanja's apartment, there was nowhere to park. Because he saw two parked police cars, Skorniak drove up to the next block instead of illegally stopping in the street to let Tanja out at home. While they were stopped, Skorniak noticed the two police cars "fl[y] past" them. Tanja got out of the truck and they said goodbye to one another. Skorniak left and started driving up the California coast.

Skorniak denied ever threatening Tanja with a knife. He did not know whether Tanja had been drinking, and claimed she never lost consciousness.

On cross-examination, Skorniak admitted he was attracted to young, blonde women; he had taken the 88 photos of the women in bikinis; he had kept Tanja's underwear as "a souvenir"; and he had six pairs of other women's underwear in his truck. He denied Tanja ever said, "Please take whatever you want, just don't hurt me."

A defense expert testified about the effects of alcohol consumption, including alcohol-induced amnesia and disinhibition. Based on Tanja's blood alcohol level of .09 percent when her blood was drawn during the SART exam, the expert estimated she had a blood alcohol level between .18 and .33 percent at 11:00 p.m. the previous night.

Amanda S. testified as a character witness for Skorniak. She met him at a park one afternoon in mid-January 2016, when she was 22 years old. They went for a "really quick" hike together and never saw each other again. Amanda testified Skorniak did not behave inappropriately with her. She was "surprised" and "unnerved" when she later learned of his pending charges.

### *Jury Verdicts and Sentencing*

After deliberating for about two and a half hours, the jury found Skorniak guilty of forcible rape (§ 261, subd. (a)(2)), kidnapping for rape (§ 209, subd. (b)(1)), and sexual penetration of an unconscious victim (§ 289, subd. (d)). As to the rape conviction, the jury found true the One Strike Law special circumstance allegations that Skorniak kidnapped Tanja and substantially increased the risk of harm to her (§ 667.61, subd. (d)), forcibly kidnapped her (§ 667.61, subd. (e)), and personally used a dangerous and deadly weapon (§ 667.61, subd. (e)). As to the aggravated kidnapping count, the jury found true the allegation that Skorniak personally used a deadly weapon. (§ 12022, subd. (b)(1).)

Skorniak admitted he had suffered a robbery conviction in 1995 that constituted both a serious felony prior and a strike prior.

The trial court sentenced Skorniak to 81 years to life as follows: on the forcible rape conviction, 50 years to life (the One Strike sentence of 25 to life, doubled for the strike prior), plus 10 years for the personal use enhancement; on the sexual penetration conviction, a consecutive 16-year term (the upper term of 8 years, doubled for the strike prior); and a consecutive five-year enhancement for the serious felony prior. The court imposed but stayed sentence on the aggravated kidnapping conviction, which we discuss in more in detail part III.A., *post*.

The court also ordered Skorniak to pay restitution and parole revocation fines of \$3,000 (§§ 1202.4, 1202.45); a \$300 sex offender registration fine (§ 290.3); a \$154 criminal justice administrative fee (Gov. Code, § 29550 et seq.); a \$90 criminal conviction assessment fee (Gov. Code, § 70373); a \$120 court operations assessment (§ 1465.8); and \$1,250 to SDPD as victim restitution for the cost of Tanja's SART exam.

## DISCUSSION

### I. *Admission of Tanja's Statement to Officer Kaiser*

The prosecutor advised the trial court that because "it's against [German] law . . . to contact victims," she was uncertain whether Tanja (or Anna or Father) would travel from Germany to testify at trial. To guard against that uncertainty, the prosecutor moved in limine to admit Tanja's statements to Anna, Michael, and Officer Kaiser; and recordings of the 911 calls by Father, Anna, and Gregory. As relevant here, the prosecution's motion contained only a truncated summary of the circumstances of Tanja's

statement to Kaiser. Skorniak opposed the motion on hearsay and confrontation clause grounds, but did not inform the court that Kaiser had testified in detail at the preliminary hearing—presided over by a different judge—regarding the circumstances of Tanja's statement to Kaiser. Those details would have informed the trial court's analysis under *Crawford, supra*, 541 U.S. 36, which holds that the confrontation clause bars the admission of testimonial hearsay unless the declarant is unavailable for trial and the defendant had a prior opportunity for cross-examination.<sup>12</sup> (*Id.* at p. 68.) Based on the limited offer of proof in the prosecution's motion, the trial court found the statements to be nontestimonial hearsay that fell within the exception for spontaneous statements.

At trial, Father and Anna testified, but Tanja did not. Officer Kaiser testified about the circumstances and substance of Tanja's statement to him in substantially similar detail as he had at the preliminary hearing. Skorniak's trial counsel did not object to Kaiser's trial testimony on *Crawford* grounds.

On appeal, Skorniak raises a *Crawford* challenge only as to the admission of Tanja's statement to Kaiser—he does not challenge the admission of Tanja's statements to Anna or Michael, or the recordings of the 911 calls. The Attorney General maintains Skorniak forfeited this challenge by failing to reassert a *Crawford* objection at trial. We agree. The evidentiary context provided by Kaiser's trial testimony varied significantly

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<sup>12</sup> It is undisputed that Skorniak never had an opportunity to cross-examine Tanja. Therefore, if her statements were testimonial, their admission violated *Crawford* regardless of Tanja's availability. Thus, the parties' extensive briefing on unavailability is of no import to our analysis on this issue.

from that on which the trial court based its earlier in limine ruling. Thus, it was incumbent on Skorniak to reassert his *Crawford* objection at trial to preserve the challenge for appeal.

Skorniak contends that any forfeiture resulted from constitutionally ineffective assistance of trial counsel. We disagree. Although a more comprehensive opposition to the motion in limine (based on Kaiser's preliminary hearing testimony) or an objection at trial might have resulted in excluding Tanja's statement to Kaiser, it is not reasonably probable that Skorniak would have obtained a more favorable outcome at trial—the remaining evidence of his guilt was overwhelming.

#### *A. Background*

##### *1. Officer Kaiser's Preliminary Hearing Testimony*

Judge Hanoian presided over the preliminary hearing on October 27, 2016. Tanja did not return from Germany to testify. Officer Kaiser testified at length about the circumstances of Tanja's statement to him—he was dispatched to check the welfare of a missing female, overheard a broadcast about a kidnapping, briefly pursued a truck matching the kidnapping suspect's vehicle, responded to his sergeant's call about a reported rape, met Tanja and her friends on the street, and returned to Tanja's apartment to interview the women. Regarding the decision of where to conduct the interviews, Kaiser testified as follows:

"A. . . . Prior to getting to the apartment, I discussed with my sergeant that I would be the case agent, I would be handling the report and that involves speaking with the main victim. So once I headed over there, I already knew I was going to be interviewing

Tanja regarding the incident. [¶] . . . [¶] . . . I already knew what to do and we already had a plan.

"Q. Okay. And you already had the context of what was going on at that point—

"A. That's correct." (Italics added.)

## *2. The Prosecution's Motion in Limine*

The prosecution moved in limine to admit recordings of the 911 calls by Father, Anna, and Gregory; Tanja's statements to Michael at the gas station; and Tanja's statements to Anna and Officer Kaiser upon being released by Skorniak. After setting forth the background facts in its motion, the prosecution summarized the circumstances of Kaiser's interview of Tanja as follows:

"Approximately fifteen minutes after giving chase to the truck, Officer Kaiser returned to Tanja's apartment where he found Tanja in the company of her friends. Tanja was distraught and shaking. Additionally, Tanja's clothing had been ripped. Tanja was visibly upset and crying when she told Officer Kaiser about her attack. Tanja was subsequently taken to undergo a SART examination. All of the clothing she was wearing that night was collected for evidence. Tanja told Officer Kaiser that she had been sexually assaulted by a man and that after the assault, he had stopped to get gas and later dropped her off at home in a red truck. Police later confirmed that this was the same red truck that was seen speeding in front of Tanja's street."

The motion did not reference Kaiser's testimony from the preliminary hearing about the decision to interview Tanja at her apartment, nor did the prosecution cite or attach the preliminary hearing transcript.

The prosecution anticipated in its motion that Skorniak "will argue that the statements in the 911 tape[s] and other statements made to first responders [i.e., Kaiser]

and [Tanja's] friends trigger Sixth Amendment concerns and *Crawford* because the victim/declarant is not present, and therefore defendant had no prior opportunity to cross examine her." The prosecution countered, however, that "[t]he statements made to Michael K[.], Tanja's friends and first responders after the initial incident are 'non-testimonial['] because the primary purpose of the questioning was to resolve an ongoing emergency." (Bolding omitted.) The prosecution asserted all the statements fell within the hearsay exception for spontaneous statements. (Evid. Code, § 1240.)<sup>13</sup>

As the prosecution anticipated, defense counsel orally opposed the motion on hearsay and *Crawford* grounds.

The trial court (Judge Maino) heard extensive argument on the prosecution's motion. At no time did either the prosecutor or defense counsel discuss in any detail Officer Kaiser's preliminary hearing testimony about the circumstances of Tanja's interview. Over the defense's objections, the court admitted "all of the 911 calls" and "the statements made to Michael K[.] at the [gas] station, to Anna and to the responding officer." The court did not expressly state its rationale, but it at least implicitly found the statements were nontestimonial because they addressed an ongoing emergency, and fell within the spontaneous statements exception to the hearsay rule irrespective of Tanja's availability. (See *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436 ["A statement

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<sup>13</sup> Evidence Code section 1240 states: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

qualifying as [a spontaneous statement] is admissible irrespective of declarant availability."]

Consistent with the court's rulings, Father, Anna, Michael, and Officer Kaiser testified as set forth in our factual summary. When Kaiser testified about the circumstances and substance of Tanja's statement to him, defense counsel did not object on hearsay or *Crawford* grounds.

### B. *Relevant Legal Principles*

The confrontation clause of the Sixth Amendment to the federal Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." (*Crawford, supra*, 541 U.S. at p. 42.)

In *Crawford, supra*, 541 U.S. 36, the United States Supreme Court reexamined the application of the confrontation clause to the admission of hearsay statements in criminal proceedings. The court observed that the text of the Sixth Amendment reflects concern with " 'witnesses' against the accused—in other words, those who 'bear testimony.' "[Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (*Id.* at p. 51.) Thus, the court concluded admission of a "testimonial" hearsay statement by a declarant who does not appear for cross-examination at trial violates the confrontation clause unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness. (*Id.* at pp. 59, 68.) This rule applies even if the statement is otherwise admissible under a hearsay exception. (*Id.* at pp. 50-51, 56 & fn. 7.) But the



rule does not apply to "nontestimonial hearsay." (*Id.* at p. 68; see *People v. Cage* (2007) 40 Cal.4th 965, 981 ["the confrontation clause is concerned *solely* with hearsay statements that are testimonial"].)

The *Crawford* court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." (*Crawford, supra*, 541 U.S. at p. 68, fn. omitted, italics added.)

The Supreme Court revisited the distinction between testimonial and nontestimonial hearsay in *Davis v. Washington* (2006) 547 U.S. 813, 823-826 (*Davis*), which arose from two consolidated domestic violence cases (*Davis v. Washington* and *Hammon v. Indiana* (*Hammon*)). The court formulated the following test to distinguish nontestimonial from testimonial statements made to law enforcement officials:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra*, 547 U.S. at p. 822.)

Applying these principles to the *Davis v. Washington* portion of the case, the court deemed nontestimonial a recording of a 911 call from a "frantic" domestic violence victim who reported events "*as they were actually happening*." (*Davis, supra*, 547 U.S. at p. 827.) The court found it clear that the victim "was facing an ongoing emergency"

and that her 911 call "was plainly a call for help against a bona fide physical threat."

(*Ibid.*)

By contrast, the Supreme Court deemed the *Hammon* victim's statements testimonial because "the primary, if not indeed the sole, purpose of the interrogation was to investigate" "possibly criminal past conduct," not respond to an emergency in progress. (*Davis, supra*, 547 U.S. at pp. 829-830.) When police responded to a reported domestic disturbance, the " "somewhat frightened" " " victim was alone on the front porch and reported that " "nothing was the matter." " " (*Id.* at p. 819.) One officer questioned the victim in the living room while another confined the suspect to the kitchen so they could " 'investigate what had happened.' " (*Id.* at p. 820.) After the victim reported the suspect had physically abused her, the officer " 'had her fill out and sign a battery affidavit.' " (*Ibid.*) In finding the victim's oral and written statements testimonial, the Supreme Court observed they were made when "there was no immediate threat to [the victim's] person," and the questioning officer "was not seeking to determine (as in *Davis* [*v. Washington*]) 'what *is happening*,' but rather 'what *happened*.'" (*Id.* at pp. 829-830, italics added.)

"The right to confrontation may, of course, be [forfeited], including by failure to object to the offending evidence . . . ." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 314, fn. 3; see Evid. Code, § 353.) "Generally when an *in limine* ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal." (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3; accord, *People v. Thompson* (2016) 1 Cal.5th 1043, 1108-1109 (*Thompson*); *People v. Brown* (2003) 31 Cal.4th 518, 547.) "The

reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Jennings*, at p. 975, fn. 3.)

This forfeiture rule, however, does not apply if all of the following conditions are met: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) *the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.*" (*People v. Morris* (1991) 53 Cal.3d 152, 190, 188-190 (*Morris*), italics added; accord *Thompson, supra*, 1 Cal.5th at pp. 1108-1109.) If each of these conditions is satisfied, defense counsel would be "justified in concluding that a mere repetition of the same objection advanced on the motion *in limine* would serve no useful purpose." (*Morris*, at p. 189.)

### C. Analysis

#### 1. Forfeiture

Skorniak forfeited his *Crawford* challenge to the admission of Tanja's statement to Officer Kaiser because, although he opposed the prosecution's motion in limine on *Crawford* grounds, he failed to object on that basis when Kaiser's trial testimony presented a significantly varied evidentiary context.

The prosecution set forth in its motion only a limited offer of proof regarding the circumstances of Kaiser's interview of Tanja—that Kaiser responded to Tanja's apartment within minutes to find Tanja "visibly upset" and wearing "ripped" clothing, at which

point "[she] told [him] that she had been sexually assaulted . . . ." In this context, the trial court reasonably concluded Tanja's statement to Kaiser was nontestimonial because it was made for the primary purpose of addressing an ongoing emergency. (See *People v. Hendrix* (2013) 214 Cal.App.4th 216, 243 ["In assessing the trial court's evidentiary ruling, we must consider the facts known to the court at the time the ruling was made."].)

By contrast, Kaiser testified at trial that although he first encountered Tanja on the sidewalk about a block from her apartment (a very informal setting), they drove separately back to her apartment (a more formal setting) to conduct the interview. By then, Kaiser's sergeant had broadcast that their suspect was armed with a knife, thereby obviating the need for Kaiser to ascertain whether the suspect was armed. Once at the apartment, Kaiser and another officer interviewed Tanja and her friends somewhat methodically (i.e., separately and in different rooms, with Kaiser "start[ing] kind of from the beginning"). At the end of the interview, Kaiser collected Tanja's clothing for DNA analysis and another officer took her to the nurse for a SART exam. Kaiser's testimony in these respects supports a strong argument that Tanja's statement was testimonial because it likely was made for the primary purpose of building an evidentiary case for future criminal prosecution, rather than to address an ongoing emergency.

Because Kaiser's trial testimony about the circumstances of his interview of Tanja varied so dramatically from the truncated summary in the motion in limine on issues central to the trial court's *Crawford* analysis, Skorniak was required to object on *Crawford* grounds to preserve the issue for appeal. (See *People v. Champion* (1995) 9 Cal.4th 879, 925 ["[t]o the extent that there were variations between the offer of proof

and [the officer's trial] testimony, defendants should have brought them to the court's attention"]; *People v. Geier* (2007) 41 Cal.4th 555, 610 ["A timely and specific objection would . . . have permitted the trial court to have made a fully informed ruling."].) His failure to do so deprived the trial court of the "appropriate context" necessary to make an informed ruling. (*Morris, supra*, 53 Cal.3d at p. 190.) Accordingly, Skorniak has forfeited his *Crawford* challenge to Kaiser's testimony.

## 2. *Ineffective Assistance of Counsel*

On appeal, Skorniak argues that any forfeiture was the result of ineffective assistance of counsel. He has not met his burden of showing his trial counsel's performance was *prejudicially* ineffective. "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland*, at p. 697; see *People v. Hester* (2000) 22 Cal.4th 290, 297 (*Hester*) ["No prejudice having been shown, we need not determine whether counsel's performance was deficient."].)

Although we need not decide the issue, we note Skorniak has a strong argument on the deficient performance prong. First, as noted, his counsel failed to object to Kaiser's testimony at trial even though it varied significantly from the prosecution's offer of proof.

Second, in opposing the motion in limine, Skorniak's counsel (who also represented him at the preliminary hearing) failed to advise the trial judge (who did not preside over the preliminary hearing) about Kaiser's preliminary hearing testimony regarding the circumstances of Tanja's interview. This included the additional details that, before returning to Tanja's apartment to conduct the interview, Kaiser "already had the context of what was going on" and had "discussed with [his] sergeant that [Kaiser] would be the case agent, [Kaiser] *would be handling the report* and that involves speaking with the main victim." (Italics added.) This strongly suggests that the primary purpose of Kaiser interviewing Tanja was testimonial—"to establish or prove past events potentially relevant to later criminal prosecution" (*Davis, supra*, 547 U.S. at p. 822)—rather than nontestimonial—"to enable police assistance to meet an ongoing emergency" (*ibid.*).

Thus, had Skorniak's trial counsel more vigorously opposed the prosecution's motion in limine or objected at trial, it is reasonably likely the trial court would have excluded Tanja's statement to Kaiser. However, we need not decide this issue because Skorniak has not met his burden of showing prejudice. (See *Strickland, supra*, 466 U.S. at p. 694; *Hester, supra*, 22 Cal.4th at p. 297.)

Skorniak has not shown prejudice because it is not reasonably probable he would have obtained a more favorable outcome at trial had Tanja's statement to Kaiser not been admitted. (See *People v. Sapp* (2003) 31 Cal.4th 240, 280 [no prejudice from admission of potentially irrelevant hearsay in murder trial "[g]iven the overwhelming evidence that [the] defendant killed his former girlfriend"].)

Anna and the Uber driver testified Tanja wanted to go home because she drank too much and was not feeling well. After vomiting in the Uber driver's car, she elected to walk the few remaining blocks home rather than be driven.

Father testified he inadvertently overheard his daughter being raped. He described for the jury the sounds he heard, including his daughter saying, "Take everything but please don't do anything to me." Father yelled into the phone and, when the call was disconnected, contacted police in Germany and San Diego. The jury heard his 911 call.

At the same time, Mother and Sister tried to track down Tanja through her friends. They eventually got ahold of Anna, who called 911 to report what she had heard. The jury also heard this 911 call.

Michael, the off-duty security manager who had never met Tanja before, testified a young woman with a German (or Swedish) accent named Tanja (or Tania) flagged him down at a gas station and told him she was being kidnapped. Michael relayed this to his roommate Gregory, who called 911 and reported it to the operator. Gregory also provided a description of the suspect and his truck.

The jury heard Gregory's 911 call, and he and Michael later identified Skorniak in photo lineups and at trial as the man they saw at the gas station. The jury saw

surveillance footage from the gas station showing Skorniak and his truck, as confirmed by Detective Forsey.

Officer Kaiser later saw Skorniak's truck near Tanja's apartment just moments before she was reunited with her friends. Skorniak testified he left town and headed north after dropping off Tanja around 3:00 a.m., and the trial court instructed the jury that evidence of a defendant's flight "may show that he was aware of his guilt." (See CALCRIM No. 372.)

Anna and Kaiser testified about Tanja's distraught demeanor and the ripped or cut appearance of her clothing.<sup>14</sup> Anna further testified that Tanja said a man held a knife to her throat and "raped her." Tanja also told Anna about telling a man at a gas station that she had been kidnapped.

Kaiser also testified that his sergeant broadcast that their suspect was armed with a seven-inch hunting knife. This was nontestimonial hearsay because the primary purpose of the statement was to enable the police to respond to an ongoing emergency.

The nurse who conducted the SART exam testified Tanja "was visibly upset" and her vital signs were elevated, consistent with being upset and under stress. Tanja's external genital area had three fresh fissures or lacerations consistent with sexual assault (but also consistent with consensual sex). DNA analysis of vaginal swabs taken during the SART exam matched Skorniak.

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<sup>14</sup> Officer Kaiser's observations regarding Tanja's appearance and demeanor are not testimonial hearsay and, therefore, would not have been excluded had the trial court denied the prosecution's motion in limine.



Father testified that Tanja was distraught when she returned to Germany immediately after the incident—weeks earlier than planned—and she has never talked to him about it.

Finally, when Skorniak was arrested three weeks after the incident, police found (1) multiple knives on his person; (2) Tanja's cut underwear—with Skorniak's DNA—in his truck; (3) a memory card containing a video of Skorniak digitally penetrating Tanja's vagina; and (4) a memory card containing 88 surreptitiously taken photos focusing primarily on the buttocks of young women playing beach volleyball a few hours before Tanja was kidnapped and raped.

In the face of this overwhelming evidence, Skorniak testified implausibly that Tanja—who had just thrown up and elected to walk the few remaining blocks home rather than use the Uber ride she had already paid for—accepted a ride from a man at least 30 years older than her and thereafter engaged in rough consensual sex with him. The jury deliberated for only about an hour and a half before rejecting this claim. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581 [brevity of jury deliberations "confirms this was not a close case on the issue of guilt."].) This was not a close case.

Thus, even assuming Skorniak's trial counsel performed deficiently by failing to properly oppose the admission of Tanja's statement to Officer Kaiser, it is not reasonably probable that Skorniak would have obtained a more favorable result had her statement been excluded.

## II. *Evidentiary Issues*

Skorniak contends the trial court erred by allowing Father, Nurse Brychta, and Detective Forsey to improperly vouch for Tanja's credibility, attack Skorniak's character, and opine on the ultimate question of his guilt. We disagree.<sup>15</sup>

### A. *Father*

Skorniak maintains Father improperly: (1) related hearsay statements made by Mother during Tanja's accidental phone call, (2) offered improper opinion testimony about the nonconsensual nature of what he overheard during the call, and (3) speculated about how loudly he yelled into the phone to "[s]top it."

Regarding Skorniak's first evidentiary challenge, Father testified as follows about what Mother said when she handed him the phone:

"Q You said your wife could no longer bear to hear the noises. What did she exactly say to you?

"[DEFENSE COUNSEL]: I'm going to object as to hearsay. It's multiple levels at this point.

"THE COURT: Overruled. Sustain admission, not for the truth of the matter, but what would be in this witness's mind upon getting some information, whether it's true or not true.

"THE WITNESS: She heard in the course of the phone call[,] 'Get out of my country.' "

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<sup>15</sup> Skorniak also makes a cumulative error claim. However, because we have found no error, "there was no error to accumulate." (*People v. Cordova* (2015) 62 Cal.4th 104, 150.)

The trial court properly overruled Skorniak's hearsay objection. As the court explained, Father's recounting of Mother's statement was not admitted for a hearsay purpose—that is, it was admitted not for the truth of the matter that Skorniak actually made such a statement but, rather, to show the impact on Father of his believing such a statement had been made. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1162.) In this posture, "[t]he statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement." (*Ibid.*) The fact that Father's recounting of Mother's statement was admitted for this limited nonhearsay purpose was made clear on at least two other occasions during trial—during the prosecutor's cross-examination of Skorniak, when the trial court sustained a defense objection that the statement "did not come in for its truth"; and during the prosecutor's closing argument, when she reminded the jury that the court gave a limiting instruction that "you cannot use [Mother's statement] for the truth of the matter of what she heard."<sup>16</sup>

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<sup>16</sup> The relevant passage from the prosecutor's closing argument reads as follows:  
"In any event, [Father] was in bed with his wife New Year's morning, and he heard that call. You got a limiting instruction at some point that the judge gave you once or twice. And one of the jurors even brought up a great question about, well, what can you use—what can we use the evidence? [¶] So the judge talked to you about certain things. And this is an example and, I believe, probably the only example in the evidence . . . [¶] . . . [¶] What the mom heard, because she did not testify, you cannot use for the truth of the matter of what she heard, and the judge told you that. However, the reason it came in was not to show that the mom, in fact, heard that, but it goes to what the mom did. [¶] And in this case [Father] told you she couldn't take it anymore. Whatever that mom heard got her

Skorniak contends the nonhearsay purpose for which Father's recounting of Mother's statement was admitted—to explain Father's conduct—was irrelevant. We disagree. Father's testimony provided context about the circumstances under which he ended up on the phone and ultimately contacted the police. Skorniak now claims the admission of this testimony also violated Evidence Code section 352 because it "was highly inflammatory" and "had little to no probative value." Skorniak forfeited this challenge by failing to raise it at trial. (*People v. Ervine* (2009) 47 Cal.4th 745, 777 [hearsay objection did not preserve claim of undue prejudice].) Skorniak's claim that his counsel performed ineffectively by failing to raise the Evidence Code section 352 objection fails because Skorniak has not established prejudice (either that the objection would have been sustained, or that the admission of the evidence was prejudicial). (See *Strickland, supra*, 466 U.S. at p. 697.)

Next, Skorniak contends Father's testimony that he overheard nonconsensual sex during Tanja's accidental phone call constituted improper lay opinion, was irrelevant, and "was doing nothing more than expressing an opinion about Tanja'[s] credibility and the guilt of [Skorniak], because if, as [Father] stated, the sexual activity was not consensual, [Skorniak] committed rape." These contentions are without merit.

"A lay witness may express an opinion based on his or her perception, but only where helpful to a clear understanding of the witness's testimony [citation], 'i.e., where

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so upset and so angry and so upset she couldn't listen anymore to her baby, to her daughter in another country. So she handed the phone over to her husband, [Father], and [he] told us what he heard. He took this witness stand, and he told us exactly what he heard."

the concrete observations on which the opinion is based cannot otherwise be conveyed.' " (*People v. Hinton* (2006) 37 Cal.4th 839, 889; Evid. Code, § 800.)<sup>17</sup> Father offered a proper lay opinion about the sounds he heard firsthand during the phone call and why he concluded they indicated a lack of consent. His testimony was helpful to the jury because the jury did not hear the call. It was relevant because it pertained directly to the central issue of the trial—consent. And although Father's testimony may have supported the jury's finding on one element of the rape count (consent), it was not improper commentary on Tanja's credibility or Skorniak's guilt.

Finally, Skorniak contends Father improperly speculated regarding how loudly he yelled into the phone, "Stop. Stop it." The following exchange occurred during the prosecutor's direct examination of Father:

"Q Were you actually screaming it so that he could hear or you thought he could hear?

"A I believe that it was loud enough that he would be able to hear it.

"[DEFENSE COUNSEL]: Objection. Move to strike. Speculation. Foundation.

"THE COURT: I'll overrule the objection. I think this is a lay opinion. You could give it some weight, no weight, whatever you think. [¶] . . . [¶]

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<sup>17</sup> Evidence Code section 800 states: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

"[PROSECUTOR]: I guess my question to you is you're speaking very softly here. Were you speaking like that or were you trying to yell at the top of your lungs for him to stop?

"A I screamed it so loudly that my wife could hear it from downstairs."

It was not an abuse of discretion to admit Father's testimony as lay opinion. As the follow-up question suggests, the testimony was helpful to the jury to indicate Father's demeanor during the phone call, which apparently differed from his demeanor on the witness stand.

*B. Nurse Brychta and Detective Forsey*

Skorniak contends Nurse Brychta and Detective Forsey improperly vouched for Tanja's credibility by testifying about the behaviors of sexual assault victims. We find no error.

As noted, Brychta testified that when she conducted the external portion of the SART exam, she observed three fresh fissures consistent with sexual assault. When defense counsel asserted on cross-examination that "nothing about any of the three fissures can tell you whether or not it's a result of sexual assault or consensual sex," Brychta responded, "Correct. But it was in line with her history." Defense counsel cautioned not to address Tanja's history, and then asked, "[I]f a woman came in and said, 'I just had consensual sex,' those fissures are . . . consistent with consensual sex?" Brychta responded, "Correct." The prosecutor asked a single question on redirect: "[D]o people who have consensual sex typically submit to an invasive SART examination?"

The court overruled defense counsel's foundational objection, and Brychta responded, "No, they do not."

Although Skorniak objected at trial on foundation grounds, he now contends this testimony constitutes improper opinion testimony and is irrelevant. Skorniak forfeited these grounds by failing to raise them at trial. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82 [foundation objection did not preserve appellate claim of impermissible opinion regarding credibility].)

Even if the challenge were not forfeited, we would find it lacks merit. The challenged testimony was given in response to a single question attacking the premise of defense counsel's hypothetical question to Brychta. The testimony did not improperly bolster Tanja's credibility.

Skorniak also challenges Detective Forsey's testimony about sexual assault victims' reluctance to submit to SART exams and to cooperate with prosecutions. For example, over defense counsel's relevance and foundational objections, Forsey testified that not all sexual assault victims submit to SART exams because "sex crimes are a very sensitive topic" and victims are reluctant to disclose their personal histories. And over defense counsel's relevance and undue prejudice objections, Forsey explained that victims' reluctance to cooperate with prosecution "doesn't mean that the crimes didn't happen," it "just means that the victims are often very distressed about disclosing this information to a bunch of strangers."

The trial court did not abuse its discretion in admitting this testimony. The jury undoubtedly took note of Tanja's absence from trial. Indeed, defense counsel commented

on it at least five times during closing argument. As Skorniak concedes in part, Forsey's testimony was relevant to explaining Tanja's absence and why the jury should not draw a negative inference from it.

To the extent Skorniak now challenges the testimony as improper opinion testimony, he forfeited the challenge by failing to raise it during trial. In any event, the testimony did not improperly vouch for Tanja's credibility or opine directly on Skorniak's guilt.

### III. *Sentencing Issues*

Skorniak raises several alleged sentencing errors. We address them in turn.

#### A. *Sentence on Kidnapping for Rape Conviction*

We decline Skorniak's request that we direct the trial court to amend the abstract of judgment to reflect a sentence on his kidnapping for rape conviction (count 2) of life with the possibility of parole, doubled for his strike prior, plus one year for the weapon use enhancement. The abstract already reflects this sentence.

#### B. *Restitution to SDPD*

Following the probation officer's recommendation, the trial court ordered Skorniak to pay the cost of Tanja's SART exam (\$1,250) to SDPD as victim restitution under section 1202.4, subdivision (f). Skorniak contends we should strike this order because SDPD is not a "victim" as defined in section 1202.4, subdivision (k).<sup>18</sup>

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<sup>18</sup> Section 1202.4, subdivision (k) states in part: "For purposes of this section, 'victim' shall include . . . [¶] (2) A . . . government, governmental subdivision, agency, or instrumentality . . . when that entity is a *direct victim* of a crime." (Italics added.)



The Attorney General acknowledges SDPD is not a proper direct victim for purposes of restitution under section 1202.4, but asks that we remand to allow the trial court the opportunity to order the payment under section 1203.1h, subdivision (b), which authorizes trial courts to require that defendants convicted of sexual assault pay the cost of evidentiary medical examinations "[i]f the court determines that the defendant has the ability to pay all or part of the cost of the medical examination."<sup>19</sup>

We agree that section 1202.4, subdivision (f) does not authorize the trial court to order that Skorniak pay SDPD the cost of the SART exam because the SDPD was not a direct victim of any of Skorniak's crimes. (§ 1202.4, subd. (k); see *People v. Martinez* (2005) 36 Cal.4th 384, 393, fn. 1 [" 'public agencies are not directly "victimized" for purposes of restitution under Penal Code section 1202.4 merely because they spend money to investigate crimes or apprehend criminals' "].)

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<sup>19</sup> Section 1203.1h, subdivision (b) states: "In addition to any other costs which a court is authorized to require a defendant to pay, upon conviction of any offense involving sexual assault or attempted sexual assault, including child molestation, the court may require that the defendant pay, to the law enforcement agency, county, or local governmental agency incurring the cost, the cost of any medical examinations conducted on the victim for the collection and preservation of evidence. If the court determines that the defendant has the ability to pay all or part of the cost of the medical examination, the court may set the amount to be reimbursed and order the defendant to pay that sum to the law enforcement agency, county, or local governmental agency, in the manner in which the court believes reasonable and compatible with the defendant's financial ability. In making the determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution. In no event shall a court penalize an indigent defendant by imposing an additional period of imprisonment in lieu of payment."

We decline the Attorney General's request to remand for an ability to pay hearing under section 1203.1h. The Attorney General has not sufficiently explained why a proper showing of Skorniak's ability to pay was not made in the first instance. (See *People v. Wardlow* (1991) 227 Cal.App.3d 360, 372 & fn. 7 [striking restitution award under section 1203.1h, subdivision (b) where "[n]o evidence was presented on the issue nor inquiry made"].)

Accordingly, we will strike the unauthorized restitution award of \$1,250 to SDPD.

### *C. Inability to Pay Fines and Fees*

In a supplemental brief, Skorniak requests that we remand for the trial court to conduct a hearing to determine his ability to pay the \$3,664 in fines and fees the court imposed.<sup>20</sup> He bases his request on the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, which held that imposing fines and fees on a defendant who is unable to pay them violates constitutional due process. Skorniak acknowledges he did not object to the fines and fees during sentencing, but maintains he has not forfeited his challenge because *Dueñas* was not decided until after he was sentenced and "was a significant departure from existing practice that trial counsel could not have reasonably anticipated." On the record before us, we conclude Skorniak forfeited this challenge.

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<sup>20</sup> As noted, the trial court ordered Skorniak to pay to pay a \$3,000 restitution fine (§ 1202.4); a \$300 sex offender registration fine (§ 290.3); a \$154 criminal justice administrative fee (Gov. Code, § 29550 et seq.); a \$90 criminal conviction assessment fee (Gov. Code, § 70373); and a \$120 court operations assessment (§ 1465.8).

Notably, the statutes authorizing \$3,454 of the \$3,664—about 94 percent—of the fines and fees Skorniak now challenges authorized the trial court to consider Skorniak's ability to pay. First, by imposing a restitution fine of \$3,000 under section 1202.4, the trial court exceeded the \$300 minimum fine, thereby authorizing the court to "consider[]" Skorniak's "[i]nability to pay." (§ 1202.4, subd. (c).) Second, because Skorniak was convicted of a qualifying sex offense, section 290.3 required that he "be punished by a fine of three hundred dollars (\$300) . . . *unless the court determines that the defendant does not have the ability to pay the fine.*" (Italics added.) Finally, the \$154 criminal justice administrative fee imposed under Government Code section 29550 et seq. is mandatory "[i]f the person has the ability to pay" it. (Gov. Code, § 29550.2.)

Skorniak's silence during sentencing in the face of \$3,454 in fines and fees he could have challenged on the basis of his alleged inability to pay "is a classic example of the application of the forfeiture doctrine relied upon by the California Supreme Court in numerous criminal sentencing cases decided well before *Dueñas*." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033, citing *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [applying the forfeiture rule to challenges to probation-related costs and an order for reimbursement of fees paid to appointed trial counsel]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853-854 [applying the forfeiture rule to an unpreserved claim regarding probation-related fees and defendant's inability to pay them]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant's claim that the trial court erred by failing to consider ability to pay a restitution fine is forfeited by the failure to object].)

#### D. *Correction of Custody Credits*

We agree with the parties that the calculation of Skorniak's presentence custody credits was off by one day. We will direct the trial court to amend the abstract of judgment accordingly.

#### E. *Discretion to Strike Enhancement for Serious Felony Prior*

When the trial court sentenced Skorniak, it was required to impose a consecutive five-year term for his serious felony prior conviction (robbery). (§§ 667, former subd. (a)(1), 1385, former subd. (b).) A subsequent legislative amendment now grants trial courts discretion to strike or dismiss five-year serious felony prior enhancements in the "furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The amendment applies retroactively to nonfinal judgments. (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 426; *Garcia*, at p. 971.)

Skorniak requests that we remand for resentencing to allow the trial court the opportunity to exercise its newly vested discretion. The Attorney General counters that remand is unwarranted because "the trial court strongly indicated that it would not be in the furtherance of justice to reduce [Skorniak]'s punishment for any reason." We agree remand is unwarranted. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [holding remand futile when trial court applied upper term to sentence for firearm enhancement citing several aggravating factors that far outweighed mitigating factors and stated upper term was the " 'only appropriate sentence' "].)

As the Attorney General points out, the trial court denied Skorniak's motion to strike his strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. In

doing so, the court noted Skorniak "had a good side"—he was "well-behaved in court," he took "excellent" nature photos, and he was employed when previously released from custody. But the court found this good side was outweighed by Skorniak's bad side:

"I firmly believe that you are within the three strikes law and this is why we have it. I think you're just too dangerous, I think these acts are too violent. And I know that I'd be committing a complete abuse of discretion by striking the strike. This is not one of those close cases that I get a lot of the time, this is not close at all."

The Attorney General also cites the fact the trial court imposed a consecutive upper term on Skorniak's conviction for sexual penetration of an unconscious victim. In doing so, the court said it did not "see any factors really for the lower term," and, on the other hand, "every one of [the factors in aggravation] applies here." The court also stated, "Mr. Skorniak, I think you're just a very dangerous individual, despite your good behavior here and many good things about you."

On this record, remand for resentencing would be futile.

#### DISPOSITION

The judgment is modified to strike the restitution award of \$1,250 to SDPD and to grant Skorniak one additional day of actual custody credits (for total credits of 765 days of actual custody). The trial court is directed to amend the abstract of judgment to reflect these modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.